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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE, *et al.*,
Petitioners,

v.

KATHLEEN S. MCCREARY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

[redacted]

BRIEF AMICUS CURIAE OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS

INTEREST OF AMICUS CURIAE

The Catholic League for Religious and Civil Rights is a civil rights organization, national in membership, organized to combat all forms of religious prejudice and discrimination, and dedicated to the defense of the civil and religious rights of all citizens, especially those rights protected in the First Amendment to the United States Constitution.

SUMMARY OF ARGUMENT

Respondents sought access to Boniface Park to erect a Nativity scene for the Christmas season. Petitioners refused respondents'

proposed display on the basis of the religious content of that display.

Boniface Park constitutes a public forum. Erection of the proposed creche constitutes expressive activity protected under the First Amendment. Consequently petitioners may not, absent a compelling government interest, deny respondents access to the public forum of Boniface Park for free speech purposes on the basis of the religious content of the proposed creche. Petitioners' sole purported justification—desire to avoid violating the Establishment Clause—fails to supply a compelling government interest. An equal access policy for public parks would not violate the Establishment Clause even though that policy provided religious groups a forum for religious expression. *Widmar v. Vincent,* 454 U.S. 263 (1981). Nor would government allowance of a Nativity display violate the Constitution. *Lynch v. Donnelly,* 104 S. Ct. 1355 (1984). Consequently petitioners face no danger whatsoever of violating the Establishment Clause. Since petitioners have not justified their content-based restriction of respondents' free speech, this restriction violates the First Amendment.

This analysis of the case applies regardless of whether respondents post a disclaimer sign accompanying their creche. The Establishment Clause does not require petitioners to disassociate themselves from respondents' creche, since petitioners could themselves erect a creche without violating the Constitution. Therefore the order of the court of appeals requiring a disclaimer sign was improper. If petitioners themselves decide to require a disclaimer sign, they must observe the relevant First Amendment limitations. Thus, a disclaimer requirement—absent a compelling interest—must not discriminate on the basis of content, and may regulate the manner of expression only insofar as it is narrowly tailored to serve a significant government interest.

This Court should affirm the judgment of the court of appeals to the extent that it finds unconstitutional petitioners' content-based denial of repondents' access to a public forum for expressive activity; this Court should, however, vacate that portion of the decision below which requires a disclaimer sign as a condition for recognition of respondents' free speech rights.

ARGUMENT

I. THE FIRST AMENDMENT PROHIBITS PETITIONER GOVERNMENT'S DENIAL OF RESPONDENTS' ACCESS TO THE BONIFACE CIRCLE PUBLIC PARK ON THE BASIS OF THE RELIGIOUS CONTENT OF RESPONDENTS' PROPOSED CRECHE DISPLAY.

Respondents, in two separate groups, applied to petitioner Village of Scarsdale for permission to erect a creche display at Boniface Circle, a publicly owned park, for the Christmas season. The Village denied both applications because of the religious nature of the displays. These denials represent content-based exclusions of expressive activity from a public forum. Since allowance of this activity would not contravene the Establishment Clause, denial of the creche displays on the basis of their religious content unjustifiably restricts respondents' freedom of speech.

A. The First Amendment Protects Respondents' Free Speech Access to the Boniface Circle Public Park.

Boniface Circle, as a public park, falls within the category of "quintessential public forums," *Perry Education Assocation v. Perry Local Educator's Association,* 460 U.S. 37, 45 (1983); *United States v. Grace,* 461 U.S. 171, 177 (1983). Attempts to restrict expressive activity in such traditional marketplaces of ideas meet stiff constitutional limitations. *Grace,* 461 U.S. at 177. Thus, a government may enforce reasonable time, place, and manner regulations only if these restrictions are neutral with respect to the content of the expressive activity, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *Id.* (and cases cited). Restrictions based on the content of the expression, moreover, violate the First Amendment unless necessary to effectuate a compelling state interest and narrowly drawn to serve that interest. *Perry,* 460 U.S. at 45; *Widmar v. Vincent,* 454 U.S. 263, 269-70 (1981).

The placement of a creche in a public park constitutes a form of speech within the ambit of First Amendment protection. *Lynch v. Donnelly,* 104 S. Ct. 1355, 1363 (creche celebrates

Christmas and depicts its historical origins); *Widmar v. Vincent*, 454 U.S. at 269 (forms of religious worship and discussion protected by First Amendment); *Tinker v. Des Moines School District*, 393 U.S. 503, 505 (1969) (symbolic speech protected by First Amendment). Restriction of such activity must therefore meet the strict constitutional standards repeatedly set forth in the decisions of this Court. *E.g., Grace; Perry; Widmar.*

B. Petitioners Have Not Justified the Exclusion of Respondents' Proposed Display.

Petitioners refused permission for the creche display, as the district court found, "because the symbol was religious . . ." *McCreary v. Stone*, 575 F. Supp. 1112, 1125 (S.D.N.Y. 1983). Denial of respondents' application therefore constituted an exclusion of speech on the basis of its content, 575 F. Supp. at 1125. The court of appeals agreed. *McCreary v. Stone*, 739 F.2d 716, 722-23 (2d Cir. 1984). *See Widmar*, 454 U.S. at 269.

To justify the content-based denial of respondents' access to a public forum, petitioners must establish that this denial was necessary to serve some compelling interest, and that the denial represented a response narrowly drawn to serve that interest without unduly interfering with respondents' free speech rights. *Grace*, 461 U.S. at 177. Petitioners, however, have failed to demonstrate a compelling interest which might justify their conduct.

Petitioners claim a compelling interest in avoiding violation of the Establishment Clause. The decisions of this Court in *Widmar* and *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984), however, completely dispose of this argument.

In *Widmar* this Court held that an equal access policy in a public university does not violate the Establishment Clause, even if that policy enables religious groups to discuss religion and conduct religious worship in school facilities. 454 U.S. at 270-75. An equal access policy in a public park similarly would pose no Establishment Clause difficulties; on the contrary, the First Amendment effectively compels an equal access policy with respect to free speech in public fora. "The question is not whether the creation of a religious forum would violate the Establishment Clause[;] . . . [instead,] the question is whether [petitioners] can now exclude groups [from a public forum] because of the content

of their speech." *Widmar*, 454 U.S. at 273 (citations omitted). Since equal access for respondents would not run afoul of the Establishment Clause, petitioners have no compelling interest in denying this access; the First Amendment therefore prohibits exclusion of the Nativity display on the basis of its content.

This is not, of course, to say that a government must allow any and all tangible expressive displays regardless of their interference—for example, by overcrowding or obstruction—with the free use of a park. In this case, however, petitioners have raised no objection whatsoever to the proposed creche except that it has religious significance. It is this exclusion on the basis of content, without compelling justification, which the First Amendment forbids.

Even aside from the principles underlying *Widmar*, petitioners cannot justify their exclusion of the creche by a claim that allowing respondents' display would violate the Establishment Clause. In *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984), this Court upheld against an Establishment Clause attack a city's sponsorship and maintenance of a Christmas creche. *Lynch* makes it clear that petitioner Village of Scarsdale could itself finance and erect a Nativity scene in Boniface Park. Certainly, then, the Village may simply allow others access to the park to set up such a display at their own expense and effort.

Widmar precludes reliance on the religious nature of the proposed creche display as a basis for denying free speech access for the proponents of that display. *Lynch* recognizes the constitutional acceptability of a governmentally sponsored creche. Either case suffices to invalidate petitioners' proffered justification—fear of violating the Establishment Clause—for exclusion of respondents' proposed creche. Hence petitioners' restriction of respondents' free speech, serving no compelling government interest, violates respondents' rights under the First Amendment.

II. THE CONSTITUTION DOES NOT REQUIRE OFFICIAL DISCLAIMER OF THE PROPOSED CRECHE.

The foregoing analysis suffices entirely to resolve the instant case. Petitioners have improperly denied respondents' rights under the First Amendment. The Constitution does not condition

respondents' rights upon their taking the further step of disassociating themselves and their proposed display from the Village by the use of a disclaimer sign. The court of appeals, nevertheless, apparently imposed a sign requirement in the instant case. 739 F.2d at 727-28. This Court, therefore, should vacate that aspect of the lower court decision.

A. The Establishment Clause Does Not Require Government Disclaimer of a Creche.

In *Lynch v. Donnelly* this Court held that government sponsorship and maintenance of a Christmas creche does not offend the Establishment Clause. 104 S. Ct. 1355 (1984). It follows that a government which does not actually sponsor a creche, but merely accommodates one by means of an equal access policy, faces no constitutional requirement to disassociate itself from the display.

The notion that government must, on pain of unconstitutionality, publicly wash its hands of all religious matters reflects a view of religion as a constitutional "taint," a view explicitly rejected in *Lynch,* 104 S. Ct. at 1365. A government need no more publicly disclaim the free speech activities of religious groups than it need disclaim similar activities by any social, political, or cultural group. *See Widmar v. Vincent,* 454 U.S. at 274.

B. The Discriminatory Disclaimer of Religious Speech Violates the Constitution.

Although the Establishment Clause does not require official disclaimer of a creche, the government may wish on its own initiative to disclaim sponsorship of respondents' proposed creche display. *See* 739 F.2d at 720-21 (Village required sign in instant case); *cf. PruneYard Shopping Center v. Robins,* 447 U.S. 74, 87 (1980) (suggesting disclaimer signs as means for private shopping center to disassociate itself from free speech activities of others on premises). Should the petitioner Village choose to require that such a sign in the future accompany respondents' Nativity scenes, the Village must observe the relevant constitutional limitations.

If the Village of Scarsdale decides to require disclaimer signs for all park displays, regardless of content, this manner regulation would need to be narrowly tailored to serve a significant government interest. *United States v. Grace,* 461 U.S. 171, 177 (1983) (citations omitted).

If the Village decides to require disclaimer signs only for respondents, or only for religious displays, this restriction would, because based on content, violate the First Amendment free speech protections unless narrowly drawn to serve a compelling government interest. *Id.* No compelling interest readily comes to mind which would require a government to disassociate itself from a creche which private citizens have erected in a public park; nor have petitioners demonstrated any such interest. The discriminatory imposition of a disclaimer requirement, moreover, since impliedly treating religion as objectionable, constitutes hostility toward religion. Thus such discrimination violates the constitutional norm of government neutrality toward religion. *Lynch,* 103 S. Ct. at 1359 (and cases cited); *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U.S. 756, 788 (1973).

The Second Circuit's creation of a supposed constitutional requirement that respondents post a disclaimer sign, therefore, was both unnecessary and improper. The requirement has no basis in current[1] constitutional law, and forces petitioners to choose between the adoption of a general disclaimer requirement (a matter of administrative, not judicial, prerogative) or the imposition of unconstitutionally discriminatory restrictions on respondents.

CONCLUSION

Petitioners have sought to exclude respondents from equal access to a public park for free speech purposes. Petitioners based this exclusion upon the religious content of respondents' proposed display, yet they failed to demonstrate any compelling justification for this content-based restriction. Therefore, this Court should affirm the judgment of the court of appeals insofar as it prohibits petitioners from excluding respondents' proposed creche on the basis of its religious content. This Court should va-

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[1] A lower court decision issued before *Lynch, Allen v. Morton,* 495 F.2d 65, 67 (D.C. Cir. 1973), required disclaimer signs as a condition for the constitutionality of creche displays. *Lynch,* of course, supersedes this case.

cate that part of the decision below, however, which imposes a disclaimer sign requirement as a condition for respondents' access to the park.

Respectfully submitted,

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